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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

[redacted]

B5

DATE: JUL 0 9 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The petitioner filed a motion to reopen and reconsider. The Director granted the motion, but denied the petition again on the merits. The petitioner filed an appeal, which is now before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a software development company. It seeks to permanently employ the beneficiary in the United States as a software developer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The Director denied the petition on two grounds: (1) the record did not establish that the beneficiary had the requisite educational degree, and (2) the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary, and the proffered wages of all other beneficiaries of pending petitions, from the priority date up to the present.

The appeal is properly filed and timely and makes specific allegations of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Case history

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on July 2, 2007. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed at the Department of Labor (DOL) on April 12, 2002 (the priority date), and certified by the DOL on May 21, 2007. The labor certification specifies that the minimum educational requirement for the job is a master's degree in science or engineering.

The Director denied the petition on June 16, 2008. The Director found that the beneficiary was ineligible for classification as an advanced degree professional because her three-year bachelor's

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

degree in India was not equivalent to a U.S. bachelor's degree, and consequently her two-year Indian master's degree that followed was not equivalent to a U.S. master's degree. The Director also found that the petitioner did not establish its ability to pay the proffered wage to the beneficiary in this proceeding, and all other beneficiaries with pending petitions, from the priority date up to the present.

The petitioner filed a motion to reopen and reconsider. In a decision dated August 14, 2008, the Director granted the motion but denied the petition on the same grounds as before. The Director found that the evaluations of the beneficiary's Indian educational degrees submitted by the petitioner were substantively inadequate and failed to establish the claimed equivalency to a U.S. master's degree. While the Director accepted that the beneficiary's Indian degrees – a three-year bachelor's degree and a two-year master's degree – were comparable to a U.S. bachelor's degree (and one year of master's degree study), he found that the beneficiary did not have the requisite five years of progressive experience in the specialty to meet the definitional requirement of a U.S. master's degree in 8 C.F.R. § 204.5(k)(2), both because the record lacked adequate documentation of her experience and because the time period between the award of her Indian master's degree and the filing of the labor certification application (the priority date) was less than five years. Even if the petitioner could establish that the beneficiary had five years of progressive experience in the specialty, the Director noted that the labor certification did not allow for the alternative combination of a bachelor's degree and five years of experience to substitute for a master's degree. As for the petitioner's ability to pay the proffered wage, the Director found that the Wage and Tax Statements (Forms W-2) in the record showed that the wages received by the beneficiary (who apparently began working for the petitioner in 2000) exceeded the proffered wage in 2006 and 2007, but were less than the proffered wage in the years 2002, 2003, 2004, and 2005. The petitioner had multiple beneficiaries with pending petitions in each of those years. The Director cited documentation in the record showing that some of those beneficiaries received compensation in excess of their proffered wages in select years. However, the record failed to establish the petitioner's ability to pay the proffered wages to all of the beneficiaries in each of the years 2002-2005.

The petitioner filed a timely appeal, asserting that the Director's decision was erroneous on both the educational and the ability to pay issues. The appeal was supplemented by a brief from counsel and supporting documentation, some of which was already in the record.

On November 28, 2011, the AAO sent the petitioner a notice of intent to dismiss the appeal (NOID), with a copy to counsel. The AAO reiterated its doubts about the reliability of the educational evaluations in the record and referred to information in the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which evaluated the beneficiary's two Indian degrees as comparable to a bachelor's degree in the United States, not a master's degree. The petitioner was invited to submit any additional evidence it might have of its continuing ability to pay the proffered wage(s) to the beneficiaries in this and all other pending petitions from the priority date up to the present. The petitioner responded with a brief from counsel and additional documentation.

The issues on appeal, therefore, are the following:

- Does the beneficiary have the requisite educational degree to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act?

- Does the beneficiary have the requisite educational degree to qualify for the job of software developer under the terms of the labor certification?

- Has the petitioner established its ability to pay the proffered wage to the beneficiary from the priority date up to the present, as well as the proffered wages of the beneficiaries of all other pending petitions during that time period?

Is the Beneficiary Eligible for the Classification Sought?

As previously discussed, the ETA Form 9089 in this case is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act, 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977).[2] This decision involved a petition filed under 8 U.S.C. §1153(a)(3) of the Act, as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 Act added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act,

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[2] In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference (advanced degree professional) immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *See Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an

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[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus five years of progressive experience in the specialty). *See* 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).[4]

The documentation of record indicates that the beneficiary earned the following educational credentials in India:

- A Bachelor of Science in Electronics from the University of Pune on December 9, 1995, after completion of a three-year degree program.

- A Master of Computer Management from the University of Pune on December 23, 2007, after completion of a two-year degree program.

On appeal and in its response to the AAO's NOID, counsel reiterates its previous contention that the beneficiary's Master of Computer Management from India is equivalent to a U.S. master's degree in that field, thereby making the beneficiary eligible for classification as an advanced degree professional. The AAO does not agree with counsel's claim.

As previously mentioned, the AAO has consulted the database (EDGE) created by AACRAO as a resource to evaluate the U.S. equivalency of foreign degrees. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to

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[4] *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[5] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[6]

EDGE states that a Bachelor of Science degree in India is awarded upon completion two to three years of tertiary study beyond the Higher Secondary Certificate (comparable to a U.S. high school diploma), with the great majority being awarded after three years of tertiary study. The Indian degree is comparable to study at a U.S. college or university for the same number of years. According to EDGE, therefore, the beneficiary's three-year bachelor's degree from the University of Pune is comparable to three years of study at a U.S. college or university. EDGE also states that a Master of Computer Management in India is awarded upon completion of two years of study beyond the three-year bachelor's degree, and is comparable to a bachelor's degree in the United States. Therefore, the beneficiary's Master of Computer Management is more likely than not comparable to a U.S. bachelor's degree, not a master's degree as claimed by the petitioner.

Counsel challenges the AAO's utilization of EDGE as a resource, charging that its opinions are simply compromises of AACRAO staff and members and no more valid than those of the credentials evaluations services utilized by the petitioner. The AAO does not agree. In reviewing this petition, the AAO has not relied on an evaluation by AACRAO of the beneficiary's specific educational credentials. Rather, it has utilized information from AACRAO's database – EDGE – that has been vetted by a panel of experts and has general applicability to all bachelor of science and master of computer management degrees in India. The evaluations submitted by the petitioner, on the other hand, are essentially the individual opinions of their respective authors as to the U.S. equivalency of the beneficiary's Indian education. The AAO considers EDGE to be a more reliable resource in this instance, especially in view of the various substantive defects in the evaluations submitted by the

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[5] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

[6] In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

petitioner. *See infra*.

Counsel points out that the U.S. equivalency rating by EDGE of a Master of Computer Management in India conflicts with five different evaluations of the beneficiary's educational credentials submitted by the petitioner in this proceeding. The evaluations are from (1) Dr. Raghu Korrapati of Education Credentials Evaluations (ECE) in Blythewood, South Carolina, dated April 7, 2008; (2) Dr. Gerald Itzkowitz of Morningside Evaluations and Consulting (Morningside) in New York City, dated April 25, 2008; (3) Mr. Barry Silberzweig of The Trustforte Corporation (Trustforte) in New York City, dated April 28, 2008; (4) Dr. Zhi-Long Chen of Silvergate Evaluations Inc. (Silvergate) in Baltimore, Maryland, dated April 28, 2008; and (5) Dr. Terry Erb of Washington Evaluation Service (WES) in Washington, D.C., dated April 29, 2008. All five of these evaluations conclude that the beneficiary's Master of Computer Management from the University of Pune is equivalent to a U.S. master's degree in the computer field. The AAO is not persuaded. After reviewing their contents, the AAO finds substantive defects in all of the evaluations.

The ECE and WES evaluations both assert that admission to the University of Pune's master's degree program in computer management required the completion of a bachelor's degree program in that field that was "equivalent" to a U.S. bachelor's degree. These assertions ignore the fact, however, that the beneficiary's bachelor's degree was only a three-year program, whereas U.S. baccalaureate degrees are generally four-year programs. *See Matter of Shah.* Neither ECE nor WES offered any rationale for evaluating the beneficiary's three-year bachelor's degree in India as comparable to a four-year bachelor's degree from a U.S. college or university. This oversight undermines the foundation of the evaluators' conclusions that the beneficiary's two-year master's degree is equivalent to a U.S. master's degree, because the essential building block – a U.S.-equivalent bachelor's degree – is missing.

The Morningside and Silvergate evaluations do not assert that the beneficiary's three-year bachelor's degree from the University of Pune is equivalent to a U.S. bachelor's degree. However, they do assert that the beneficiary's first year of study in her master's degree program was "substantially similar" to the completion of U.S. bachelor's degree (Silvergate) or "equal to the final year of an undergraduate program in the United States" (Morningside). In the opinion of the evaluators, the second year of the beneficiary's master's degree program at the University of Pune was "substantially similar" to the completion of a U.S. master's degree (Silvergate) or "equivalent to one year of graduate level coursework or a master's degree from an accredited institution in the United States" (Morningside). Neither of these evaluations is convincing because they cannot overcome the fact that the beneficiary does not have a bachelor's degree comprising four years of study. *Matter of Shah.* Three years of bachelor's level study in one degree program, followed by one year of master's level study in another degree program, does not constitute a single "foreign equivalent degree" to a U.S. bachelor's degree within the meaning of 8 C.F.R. § 204.5(k)(2). Without that academic building block in place, the conclusions of Morningside and Silvergate that the second year of the beneficiary's two-year master's degree program at the University of Pune is equivalent to a U.S. master's degree has little weight.

The Trustforte evaluation concludes that the beneficiary's five years of study at the University of Pune constitute a single source master's degree, akin to programs at U.S. universities that produce master's degrees after five years of study. Attached to the Trustforte evaluation are a list of U.S.

schools that offer five-year joint bachelor's/master's degree programs in the computer field and a list of U.S. schools that offer one-year master's degree programs in the computer field. It would appear that all of the five-year joint bachelor's/master's degree programs at U.S. schools incorporate a four-year bachelor's degree, not a three-year degree like the beneficiary's in this proceeding. A four-year bachelor's degree would also appear to be the prerequisite for admission to a U.S. school's one-year master's degree program in the computer field. Accordingly, the five-year joint bachelor's/master's degree programs and one-year master's degree programs in the United States cited by Trustforte are not comparable to the beneficiary's post-secondary studies in India, which consist of a three-year bachelor's degree and a two-year master's degree. In the final analysis, the Trustforte evaluation does not establish that the beneficiary's education was substantially equivalent to a U.S. five-year joint bachelor's/master's degree program, which is the crux of the issue.

Furthermore, the Trustforte evaluation of April 2008 contradicts its own earlier evaluation of the beneficiary's educational credentials, dated July 5, 2000. In that initial evaluation Trustforte concluded that the beneficiary's three-year Bachelor of Science degree in India was "substantially similar" to three years of study in a bachelor of science program at a U.S. college or university, and that the beneficiary's two-year Master of Computer Management degree in India, in conjunction with her three prior years of study, was "substantially similar" to a Bachelor of Science degree in computer science from a U.S. college or university. The Trustforte evaluation in 2000 accords with EDGE's credential advice regarding the U.S. equivalency of an Indian Master of Computer Management degree. In its second evaluation eight years later, Trustforte changed its conclusion based on the fact that many U.S. schools award master's degrees in the computer field after five years of study. As discussed above, the AAO is not persuaded by that line of reasoning. The AAO considers the initial Trustforte evaluation in 2000 as a more accurate conclusion as to the U.S. equivalency of the beneficiary's Indian education.

Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For the reasons discussed above, the AAO determines that the evaluations submitted by the petitioner have little probative value as evidence that the beneficiary's Indian credentials – the three-year bachelor's degree and the two-year master's degree – are comparable to a U.S. bachelor's degree and a U.S. master's degree, respectively, or that the beneficiary's Master of Computer Management from the University of Pune, standing alone, is equivalent to a U.S. master's degree.

In support of its claim that the beneficiary has the foreign equivalent of a U.S. master's degree, counsel cites an unpublished decision issued by the AAO in another immigrant petition. The case involved a three-year bachelor's degree and a two-year master of science in physics from Andhra University in India, in which the AAO found the Master of Science to be equivalent to a U.S. master's degree in physics. (LIN 06 164 51652, AAO decision Dec. 5, 2007.) As previously discussed, EDGE indicates that a two-year Master of Computer Management degree in India that follows a three-year bachelor's degree is comparable to a bachelor's degree in the United States. The AAO is not bound in the instant proceeding by its decision on another Indian degree case from 2007. While the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are

binding on all its employees in the administration of the Act, unpublished decisions (like the one cited by counsel) are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a).[7] Thus, the decision in the Indian degree case cited above is not a precedent, is not binding on the AAO, and is not persuasive evidence that the beneficiary's Master of Computer Management from the University of Pune is equivalent to a U.S. master's degree in that field.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish that the beneficiary has a foreign equivalent degree to a U.S. master's degree in science or engineering, as required by the labor certification. In accordance with EDGE's credential advice, the AAO concludes that the beneficiary's education is more likely than not comparable to a U.S. bachelor's degree in the field of computer science.

A bachelor's degree, standing alone, does not meet the definition of an advanced degree in 8 C.F.R. § 204.5(k)(2). The labor certification does not specify that the advanced degree requirement can be satisfied in this case with a bachelor's degree and five years of progressive experience in the specialty. Thus, the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

Accordingly, the petition cannot be approved.

2. Is the Beneficiary Qualified for the Job Offered?

To be eligible for approval as an advanced degree professional, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under

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[7] The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd.* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

> section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found in Part A, box 14 the Form ETA 750. This section of the labor certification application describes the minimum education, training, and experience required for the job offered. It is important that the application be read as a whole.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case Part A, box 14 of the Form ETA 750 specifies that a master's degree in science or engineering is the minimum educational requirement, and that no training or experience is required. No combination of education and experience is acceptable as an alternative to a master's degree in the indicated field(s).

The beneficiary does not have a U.S. master's degree in science or engineering. Nor does she have a foreign equivalent degree to a U.S. master's degree, as previously discussed. While the beneficiary does have a foreign equivalent degree to a U.S. bachelor of science degree, that degree does not qualify the beneficiary for the job offered because the labor certification does not specify that a bachelor's degree and five years of progressive experience in the specialty can substitute for a

master's degree.[8] Thus, the beneficiary does not satisfy the minimum educational requirement of the labor certification to qualify for the proffered position.

For this reason as well, the petition cannot be approved.

Has the Petitioner Established its Continuing Ability to Pay the Proffered Wage?

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which in this case was April 12, 2002. *See* 8 C.F.R. § 204.5(d). The labor certification states that the "rate of pay" for the proffered position is $60,000 per year (Form ETA 750, Part A, box 12).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the record indicates that the beneficiary began working for the petitioner in the job offered in September 2000 (before the priority date in 2002), and continued to work for the petitioner through 2009. As shown on the

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[8] As previously discussed, the Director also found that the record lacked adequate documentation of the beneficiary's experience and, even if it did, the time period between the award of the beneficiary's Indian master's degree and the priority date of the instant petition was not quite five years.

Forms W-2, Wage and Tax Statements, in the record, the beneficiary received the following amounts of "wages, tips, other compensation" from the petitioner from 2002 through 2009:

2002:	$ 51,584.58
2003:	$ 51,235.68
2004:	$ 49,792.81
2005:	$ 54,417.68
2006:	$ 68,119.91
2007:	$ 68,178.74
2008:	$ 67,242.87
2009:	$ 67,322.76

These figures establish the petitioner's ability to pay the proffered wage of $60,000 per year in the years 2006-2009, but not in the years 2002-2005. The shortfall between the proffered wage and the compensation received in those first four years was as follows:

2002:	$ 8,415.42
2003:	$ 8,764.32
2004:	$ 10,207.19
2005:	$ 5,582.32

Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (April 12, 2002) up to the present by means of its actual compensation to the beneficiary over the years.

As an alternate means of determining the petitioner's ability to pay the proffered wage for the years 2002-2005, as well as 2010, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns,[9] without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as

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[9] The petitioner's federal income tax return for 2011 had not yet been filed at the time of its latest submission to the AAO (in response to the NOID) in January 2012.

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

The petitioner's federal income tax returns for the years 2002-2005 and 2010 show the following figures for net income (Form 1120, line 28, and Form 1120S, line 21):[10]

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[10] For federal income tax purposes, the petitioner was structured as a C corporation in the years 2002-2005, and as an S corporation in 2010. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If there are relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). In this case, the entries on the petitioner's Form 1120S for 2010 are identical on page 1, line 21, and on Schedule K, line 18.

2002:	$ 4,670.00	
2003:	$ 17,477.00	
2004:	$ 15,149.00	
2005:	$ 0.00	(-$32,664.00)
2010:	$ 94,406.00	

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.[11] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As indicated on the federal income tax returns in the record, the petitioner's net current assets in the years 2002-2005 and 2010 were as follows:

2002:	$ 48,149.00	
2003:	$ 6,819.00	
2004:	$ 0.00	(-$10,212)
2005:	$ 0.00	(-$13,314)
2010:	$ 21,932.00	

If the beneficiary were the only alien for whom the petitioner had filed a labor certification application and an immigrant visa petition in the last ten years, the petitioner would be able to establish its ability to pay the proffered wage, or the difference between the proffered wage and the amounts actually paid to the beneficiary, for every year except for 2005 based on its net income (in 2003, 2004, and 2010) and/or its net current assets (2002 and 2010). For 2005, however, the petitioner had both a net loss for the year and net current liabilities at year's end.

Thus, the evidence of record fails to establish the petitioner's ability to pay the proffered wage in 2005 based on the wages actually paid to the beneficiary, the petitioner's net income, or the petitioner's net current assets that year.

Moreover, the AAO rejects counsel's contention (in his brief responding to the AAO's NOID) that the AAO should only consider evidence of the petitioner's ability to pay the proffered wage to the

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[11] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

instant beneficiary because the instant petition applies only to her. The AAO cannot overlook the fact that the petitioner has had numerous other labor certification applications and associated immigrant visa petitions pending during the past decade – *i.e.* since the priority date of the instant petition. The petitioner's ability to pay the proffered wage in any one year to the instant beneficiary was certainly affected by the petitioner's obligations to other beneficiaries that year, and vice versa. The petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

With its appeal brief in 2008 the petitioner submitted a chart (Exhibit U) listing 11 then pending labor certification applications or immigrant visa petitions and their associated beneficiaries, whose priority dates ranged from 2001 to 2007. In 2005, when seven beneficiaries were employed by the petitioner, five of the seven (including the beneficiary in the instant proceeding) were paid less than their proffered wages. As indicated in the chart, the total difference between the proffered wages and the amounts actually paid to those five beneficiaries was $43,099.32. The chart also indicates that in 2004, when six beneficiaries were employed by the petitioner, three of the six (including the beneficiary in the instant proceeding) were paid less than their proffered wages. As indicated in the chart, the total difference between the proffered wages and the amounts actually paid to those three beneficiaries was $54,836.17.

Counsel asserts that the petitioner could have utilized some of its expenditures on subcontractors in 2004 and employee benefits in 2005 to pay the instant beneficiary an additional $10,219.07 in 2004 and $5,582.32 in 2005, which would have brought her total compensation for those years up to proffered wage of $60,000. The subcontractor expenditures in 2004 totaled $564,827.00. According to counsel, employee benefits expenditures in 2005 totaled $72,987.85. These amounts would have been more than sufficient to cover the compensation shortfalls of the instant beneficiary, as well as all other beneficiaries in those years.

The figure of $564,827 is recorded in the petitioner's 2004 Form 1120 as a "Cost of Goods Sold" (page 1, line 2, and Schedule A, line 8) and specifically identified in the "Statement Summary" as "Subcontractors." However, neither counsel nor the petitioner has identified any particular contractors who could have been eliminated in 2004, or any particular contractors who could have been replaced by the instant beneficiary and/or other beneficiaries already employed at that time. Thus, the record does not support counsel's claim that any of the $564.827 expended on subcontractors in 2004 could have been redirected by the petitioner to augment the wages of the instant beneficiary (and other beneficiaries who were paid less than their proffered wages).

With regard to 2005, there is no entry on the petitioner's Form 1120 identifying a sum of $72,987.85 expended for employee benefits. Counsel references a ledger of alleged expenditures by the petitioner for medical insurance over the 12-month time period of January through December 2005 (Exhibit Q.1 with the appeal brief). The ledger identifies the insurance company recipients, but not the beneficiaries, of the alleged payments. Thus, the ledger does not show that any of the listed expenditures were on behalf of the petitioner's employees. Nor is the ledger corroborated by any

documentation of the individual expenditures. Finally, the petitioner has not shown that the alleged insurance expenditures were voluntary (rather than mandated by law) and could therefore have been diverted to other purposes. For all of these reasons, the record does not support counsel's claim that the petitioner could have utilized some of the $72,987.85 allegedly spent on employee benefits in 2005 to augment the wages of the instant beneficiary (and other beneficiaries who were paid less than their proffered wages).

As for 2002 and 2003, counsel has not identified any particular financial resources not already reflected in the petitioner's federal income tax returns for those years that could have been utilized to augment the wages of the instant beneficiary (who, according to the petitioner, was the only beneficiary not paid the full proffered wage in those years).

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612.[12] USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner indicates that it was established in 1996 and had 24 employees when the instant petition was filed in 2007. The federal income tax returns in the record show declining gross receipts from 2002 through 2005 – from $3,510,234 in 2002, to $3,101,244 in 2003, to $2,733,198 in 2004, to $2,252,101 2005 – followed by a modest uptick to $2,479,671 in 2006. By 2010, the only other year with a federal income tax return in the record, the petitioner's gross receipts had risen to $3,227,435. Thus, during the four consecutive years when the petitioner was paying the beneficiary less than the proffered wage – 2002 to 2005 – the petitioner's gross receipts steadily declined. From 2002 to 2005 the petitioner's business, as measured by gross receipts, decreased by 36%. As previously discussed, the petitioner has not shown that it had other financial resources not reflected

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[12] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

in its federal income tax returns which could have been utilized for the purpose of paying the full proffered wage to the instant beneficiary, and the beneficiaries of other pending labor certification applications and immigrant visa petitions, in the years 2002-2005. While the company's business condition appears to have improved since then, the petitioner must establish its continuing ability to pay the proffered wage to the beneficiary from the priority date onward. The petitioner has not done so in this case.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage to the instant beneficiary, and the beneficiaries of all other pending labor certification applications and immigrant visa petitions, during the years 2002-2005. The petitioner has also failed to establish that it had the ability to pay the full proffered wage to the beneficiary alone in 2005.

For all of the reasons discussed in this decision, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date (April 12, 2002) up to the present. On this ground as well the petition cannot be approved.

Conclusion

The petition is deniable on three grounds:

1. The beneficiary does not have the requisite educational degree – specifically, a U.S. master's degree or a "foreign equivalent degree" in science or engineering – to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

2. The beneficiary does not qualify for the proffered position under the terms of the labor certification because she does not have the requisite educational degree – specifically, a U.S. master's degree or a "foreign educational equivalent" in science or engineering.

3. The petitioner has not established its continuing ability to pay the proffered wage to the instant beneficiary, as well as the beneficiaries of all other pending immigrant visa petitions filed by the petitioner, between the priority date of the instant petition and the present.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.